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CITATIONS

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 914

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST CITY NATIONAL BANK OF HOUSTON, SOUTHERN NATIONAL BANK OF HOUSTON, AND WILLIAM B. CAMP, ACTING COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees move that the judgment of the District Court be affirmed on the ground that the questions raised by appellant are so insubstantial as not to warrant further argument.

STATEMENT

Two banks may not merge without the prior consent of the appropriate bank supervisory agency.[1]

[1] The Comptroller of the Currency when the resulting bank is to be national; the Federal Reserve Board when the resulting bank is to be state chartered but a member of the Fed-

Under the Bank Merger Act of 1966[2] (BMA–66), such consent is to be withheld if the proposed merger violates enumerated antitrust standards unless such considerations are outweighed by the needs of the community to be served. If these precepts are complied with, no antitrust suit may be filed challenging the merger unless bottomed on a monopolization. If the Department of Justice believes that the proposed merger did not meet these BMA standards, then it may institute a suit for court review of that issue.[3]

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eral Reserve System; and the Federal Deposit Insurance Corporation when the resulting bank is to be state chartered; not a member of FRS but is insured by the Corporation. (Except that the Corporation is the appropriate agency in every case where one of the parties is an uninsured institution.) This encompasses the overwhelming majority (97%) of all banks and trust companies.

[2] 12 U.S.C. 1828(c), as amended, February 21, 1966.

[3] BMA–66, § 5(B); 7(A)–(C); 2(c)

(5) The responsible agency shall not approve—

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the

The proposed merger of defendant banks herein was approved by the Comptroller after a finding that no substantial anticompetitive effects would follow the merger but that the extensive benefits which the merger would afford to the Houston metropolitan area should, in any event, prevail. Thereupon, the Department of Justice instituted this action alleging a violation of the standards, not of BMA–66, but of Section 7 of the Clayton Act. The Comptroller consequently moved to dismiss. The Court below, reluctant to dispose of any important case on the pleading, provided plaintiff with an opportunity to amend. It declined.

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merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.

Sec. 2(c) Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act.

Thus we believe a more accurate framing of the question presented by appellant's jurisdictional statement may be derived from its recitation of contentions in its argument below:

> Section 7 of the Clayton Act is still applicable to bank mergers; it has not been replaced or repealed by the Bank Merger Act of 1966, and plaintiff is not required to plead or prove a violation of the Bank Merger Act.[4]

What appellant poses as the question here[5] is merely one of a series of related subsidiary issues, the answers to which may be derived from this principal inquiry. This root question has been answered adversely to plaintiff's position by a special three-judge Court in San Francisco and by five Chief Judges in as many districts who have considered the statute in six separate cases.[6]

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[4] Page 7, brief in opposition to the motion to dismiss.

[5] "Whether the Bank Merger Act of 1966 requires the government in an antitrust suit challenging a bank merger to establish not only that the merger may substantially lessen competition but also that its anticompetitive effects are not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." (Jurisdictional Statement, page 2).

[6] *United States* v. *Mercantile Trust Company*, et al., E.D. Mo., No. 65 C 241(1) (St. Louis); *United States* v. *Provident National Bank, et al.*, E.D. Pa., No. 46052 (Philadelphia); *United States* v. *Third National Bank of Nashville, et al.*, M.D. Tenn., No. 3849 (Nashville); *United States* v. *Crocker-Anglo National Bank, et al.*, N.D. Cal., No. 41808 (San Francisco); *United States* v. *First National Bank of Hawaii, et al.*, D. Hawaii, No. 2540 (Hawaii).

ARGUMENT

Appellant persists in its contention that Clayton § 7 remains unaffected despite the plain language of BMA–66, arguing that:

1. *BMA–66 is a congressional recognition of the broader horizons of the failing company doctrine which this Court recognized in the Philadelphia National Bank case;*
2. *"Review de novo", inserted at the request of appellant, does not mean a review of the handling by the regulatory agency of the issues presented to and considered by it; rather it is not a review at all, but instead a trial de novo "free of presumptions traceable to anyone."*[1]
3. *The convenience and needs test is an exception to a statutory injunction which therefore need not be negatived. Further, this sort of information is more readily available to defendants who should logically be required to advance it.*

1. FAILING COMPANY DOCTRINE

Appellant suggests that the *real* purpose of the 1966 Bank Merger Act was to make sure that banks in financial straits could be merged into safer institutions without fear of running afoul of the antitrust laws. This, it proposes, is the substance of the phrase "convenience and needs" of the community.

The failing company doctrine is well recognized in antitrust law. Its broader application to banking cases was carefully noted in *Philadelphia Bank.*

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[1] Pre-Trial Brief, *U.S.* v. *Provident National Bank, et al.*, p. 28.

> Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to correct them a merger is necessary.*
>
> *Thus, arguably, the so-called failing company defenses, * * * might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures.[8]

But if the whole court could subscribe to this notion (and the dissent did so by implication) what valid purpose would be served by solemnly enacting a judicially recognized—and indeed unopposed—principle? We may not assume that Congress legislates to no purpose.

Plaintiff's argument is without merit.

The Court in *Crocker* categorically rejected this contention:

> "[T]he language * * * from Seaboard * * * would seem to make negative another argument of the Government * * * that * * * 'convenience and needs of the community to be served' is but a reiteration of the 'failing company doctrine' long recognized as 'an integral part of settled antitrust law.' No such limiting suggestion was ever made in the Seaboard Air Line case and the other cases dealing with the same statute. In our view it would be absurd to find that the new standards so carefully framed for the 1966 Bank Merger Act were no more than the inclusion of a wholly unnecessary reference

[8] *United States* v. *Philadelphia National Bank*, 374 U.S. 361, at pp. 371–2 (1963).

to the 'failing company doctrine.' There is not the slightest indication in the language of the Act, or in its legislative history, to support the Government's effort thus to cancel or dissipate the declared purpose of the Act." (pp. 20–21 Slip Opinion 10/6/1966)

As did the court in *Nashville:*

"The plaintiff's restrictive interpretation of the 1966 amendment finds little support either in legislative history or in the text of the amendment itself. On the contrary, both legislative history and the textual provisions of the amendment strongly indicate that it was the intent of Congress to effect substanial changes in existing antitrust law relative to bank mergers as enunciated in the Lexington and Philadelphia cases." (pp. 12–13 Slip Opinion 11/22/66)

Both Chief Judge Clary in *Provident* and Chief Judge Pence in *Hawaii* have specifically endorsed the opinion in *Crocker.*

2. THE MEANING OF "REVIEW DE NOVO"

Appellant contends that the term requires the court to ignore the findings of the banking agency and to assess the banking and competitive factors afresh. While such a construction might be compatible with the words "de novo" alone, it is hopelessly in conflict with the concept of a "review."

A review is inevitably in the nature of a re-examination of something and here the only thing which could be "reviewed" is the approval by the agency. Moreover, with specific reference to the "convenience and needs of the community to be served", serious con-

stitutional and practical problems attend the view advocated by Justice.

In *Philadelphia*, this Honorable Court indicated grave doubts concerning the competence of courts to deal with these questions as matters of first impression.

> We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. *A value choice of such magnitude is beyond the ordinary limits of judicial competence,* and in any event has been made for us already, by Congress when it enacted the amended Section 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid. (Emphasis supplied.)[9]

Of course, this kind of judgment has, historically, been assigned by the Congress to the regulatory agencies. The court has had no qualms in evaluating the performance of these agencies in particular contexts, but always with the view that the agency's expertise is to be given at least *prima facie* and sometimes presumptive weight.[10]

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[9] *Supra*, p. 371.

[10] See, e.g., *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), *Board of Trade* v. *United States*, 314 U.S. 534 (1942), *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134; *Federal Radio Commission* v. *Nelson Brothers*, 289 U.S. 266, in which words of a rough comparability with "convenience and needs" are used approvingly. Certainly, as Congressman Reuss pointed out when queried about the phrase,

While a court might express some reservations concerning its competence on the question of what is a banking factor and how said factors serve the convenience and needs of the community, it has not felt itself constrained in assessing the weight to be accorded those factors once the banking agency has set them out and explained its reasoning.

Thus we believe that a "review *de novo*" simply means that the court will use the banking agency's findings as *prima facie* valid, but subject to revision should the court be convinced on its fresh examination that they are not supported by substantial evidence. With this view, the legislative history is in accord.

Senator Javits

> If the Department of Justice does its job and the courts ultimately apply this test de novo—in short, is it not implied clearly, from the right of regulatory agencies to go into court that the court will determine this issue, and I am sure, being influenced by what the regulatory agency decided but not being bound by it.

Senator Hart

> The Senator is correct."[11]

"They will require court interpretation" (C.R. 2/8/66, p. 2547) but as he pointed out—so did the broad language of the Sherman Act. "Convenience and needs" here encompass a careful evaluation of the spectrum of banking services offered or needed in the light of a community's economic development and requirements. See *Suburban Bank of Kansas City* v. *Jackson County State Bank*, 330 S.W. 2d 183 (Mo. 1959); *Chimney Rock National Bank of Houston* v. *State Bank Board*, 376 S.W. 2d 595 (Tex. 1964); *Wall* v. *Fenner*, 76 N.W. 2d 722 (S.D. 1956).

[11] Congressional Record, 2/9/66, p. 2548.

Senator Holland

> [The bill] will give greater weight to the finding of the regulating agency without making that final in the event some bad mistake is made.[11]

Contrary to its representation in the Jurisdictional Statement that it was the source of the term "review *de novo*", Justice had originally proposed that the statute should recite a "trial *de novo*" test. In his letter of September 24, 1965 to Representative Patman, Mr. Katzenbach had recommended court review of bank mergers by "trial *de novo* of all issues in any such suit."

The expression "review *de novo*" contained in the final bill was a result of the meetings among interested agencies requested by Representative Reuss on October 20, 1965. It was incorporated among Justice's proposals amendatory to the Ashley Bill on January 5, 1966.

Without any firm evidence as to the source of the term, we suggest that the attendant circumstances support the likelihood that the term "review *de novo*" was lifted from the opinion of the Fourth Circuit in the *Smithfield* case.[12] It will be recalled that Mr. Katzenbach had proposed "trial *de novo*" on September 24, 1965. The Ashley-Ottinger Bill was voted out on October 19, and Representative Reuss had proposed his substitute measure on October 20. *Smithfield* was decided October 21. The meetings referred

[11] *Id.* p. 2550.

[12] First National Bank of Smithfield, North Carolina v. Saxon, 352 F. 2d 267 (1966).

to above took place between that date and January 3, 1966.

Smithfield dealt, *inter alia*, with the question of the weight to be given the Comptroller's opinion granting a contested branch application. The Circuit Court remanded the case to the District Court noting that

> we will request the Court to review de novo the action of the Comptroller. (p. 273)

On the question of the difference between this phrase and the established "trial *de novo*", we believe that the distinction rested on the limited nature of the appellate review which the Circuit felt that the District Court was entitled to make

> If after the court has made its fact findings, it then appears that the decision of the Comptroller is dependent upon an exercise of discretion, the Court cannot substitute its discretion for the Comptroller's. However, it can set aside such a determination if, in the light of the facts found by the Court, it concludes that the Comptroller has abused, exceeded or arbitrarily applied his discretion. (p. 272)

This case and *Smithfield* involve different statutes. However, we need not pause to evaluate the distinctions. Clearly, the juxtaposition of events illumines the intent of Congress as to the meaning of "review *de novo*" as being something less than a clear slate and more approximating the presumptive validity Congress has traditionally accorded the judgment of a regulatory agency. The decision coming just before the adoption of identical language in legislation gives rise to the presumption in Sutherland that

> legislative language will be interpreted on the assumption that the legislature was aware of * * * judicial decisions."[14]

Thus, while we need not reach the question whether *Smithfield* should govern us here, it does establish a definition of the meaning of the phrase "review *de novo*" which we may reasonably conclude was before the eye and within the intendment of the Congress when it adopted the term in BMA-66.

The court in *Crocker* found that the statutory scheme provided for a review of the competitive and convenience factors found by the regulatory agency. It held

> "No difficulty would be presented here so far as reviewing *de novo* the first of these determinations for this court has traditionally adjudged whether mergers have anti-competitive effects. But the problem of reviewing the second determination by the Comptroller, namely, whether the proposed transaction is outweighed in the public interest, and whether it meets the convenience and needs of the community, is plainly and unquestionably a legislative or administrative determination of a type which this court, as a constitutional court, is prohibited from deciding." (p. 12)

> "This does not mean that the administrative order of an agency or commission may not be reviewed in a judicial proceeding in a constitutional court; but such a review is necessarily limited to the determination if questions of law

[14] Sutherland, Statutory Construction, Section 4510, 3rd Edition, Horach.

and the ascertainment of whether findings of fact by the agency are supported by substantial evidence." (p. 14)

"It is plain to us that the congressional purpose here was to provide for an initial decision by the Comptroller and that the action brought by the Department of Justice should be deemed an action to review that decision. It is noteworthy that the section of the statute which uses the term 'de novo' does not speak of a trial de novo but of a *review* de novo.

The legislative scheme here, in our view, resembles that which is more elaborately spelled out in those sections of the Interstate Commerce Act which were discussed in the recent case of *Seaboard Air Line Co. v. United States*, 382 U.S. 154." (p. 19)

* * * * *

"In holding that our function now, under the 1966 Act, is to review an appropriate order of the Comptroller, we are disapproving other alternatives. One alternative would be to hold that we must disregard any suggestion for a review and simply decide the case on the evidence now before us, applying directly the standards set forth in Section 18(c)(5). Such, we think would not be consonant with the clear purpose and intent of the Act. Plainly the whole intent was that there should be made available in determining the validity of bank mergers the expertise of persons familiar with banking and with the operating procedures of banks. Not only is this court constitutionally without power to evaluate such features of the 'probable effect of the transaction in meeting the con-

> veniences and needs of the community to be served' but we lack the informed experience properly to apply such tests." (pp. 26–27)

In *Provident*, the court distinguished *Crocker* on the ground that no hearing had been held in the *Provident* case. Had there been a hearing, he would have found a substantial evidence rule; but lacking it, he found that the case fell within *Smithfield:*

> "The substantial evidence rule, therefore, may be invoked only when a proper foundation is laid for it as was done in Crocker.
>
> Therefore, the Court will hear all evidence in law and in fact, and if after it has made its findings, it then appears that the decision of the Comptroller is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings, it appears that the Comptroller abused, exceeded, or arbitrarily applied his discretion, the Court will set it aside."

(See also slip opinion, 12/29/66, p. 5)

Chief Judge Miller, in *Nashville* specifically adopted the rationale of *Crocker* as to the scope and nature of the judicial review of the action of the regulatory agency. (P. 10, Slip Opinion).

3. "CONVENIENCE AND NEEDS" IS DEFENSIVE MATTER

As part of their "Application to Merge," national banks are required to file a substantial "Economic Brief" which is in large part devoted to a showing of the ways in which the proposed merger will serve the needs of the community. In addition, the opinion

of the Comptroller [15] sets out his findings on the convenience and needs factors.[16] Thus, any necessity for Justice to grope blindly for putative "conveinence and needs" factor is more theatrical than real. No one, of course, would preclude the court from enquiring into possible additional factors (Compare Fn 7a in the Jurisdictional Statement). This, however, raises questions of the *order* not the *burden* of proof.

The test for determining which party has the burden of establishing a case or issue is found in the result of an inquiry as to which party would be successful if no evidence at all were given, the burden being, of course, on the adverse party.[17] This rule was recently restated by Judge Yankwich in a 9th Circuit case:

> The question as to whether the burden of proof in its primary sense rests upon the plaintiff or defendant is ordinarily to be determined by ascertaining from the pleadings which of the parties without evidence would be compelled to submit to an adverse judgment before the introduction of any evidence.[18]

Let us assume, arguendo, in this case that plaintiff was to prove that, among financial institutions, in a

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[15] In this case, no opinion of the Comptroller was published until December 1, 1966. This was, however, some 19 days prior to appellant's decision not to assume the burden of negativing these factors.

[16] See in particular PP 14 and 22–25 of the Opinion dated 12/1/66.

[17] Corpus Juris Secundum, Evidence § 104.

[18] Pacific Portland Cement Company v. Food Machinery and Chemical Corp. C. A. Calif. 178 F. 2d 541, 547 (1949).

reasonably premised, adequate "section of the country" this merger would tend to substantially lessen competition and stop there. Could it prevail in the absence of further evidence from any party? We think clearly not.

The procedural scheme of BMA–66 contemplates that a proposed merger will be tested by the bank regulatory agency under the statutory criteria and if that agency finds the criteria have been met it will—only then—approve the proposal. Then, if Justice believes that the bank regulatory agency erred in applying these criteria, it may move the courts to review the decision of that regulatory agency. Thus, *ab initio,* Justice's suit must be premised on agency error. But since proof that competition might suffer is not proof that the agency erred (since the merger might still be properly approved), Justice is under the further constraint of proving that the statute was violated—i.e. that "convenience and needs" did not outweigh the anticompetitive effects. For lacking any evidence on the question, the presumption of regularity which attaches to the decisions of the regulatory agency would then require a dismissal of the complaint.

> The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done.[19]

This particular application is in accord with the general rule that the plaintiff has the burden of proof

[19] Matter of Marcellus, 165 N.Y. 70, 75, 58 N.E. 796, 798.

as to all the elements of his claim or cause of action."[20] The faiure of the plaintiff to sustain such burden is fatal to his recovery.[21] The fact that the establishment of an affirmative case requires proof of a material negative allegation (anticompetitive effects not outweighed by convenience and needs);[22] such as that the case does not come within an exception provided for, does not save the party who makes such an allegation from the burden of pleading[23] and proving it.[24]

With this conclusion, the courts seem to be in uniform accord:

> It seems to be well settled that where the plaintiff in stating his cause of action must affirm a negative, he has the burden of providing the negative averment. * * *. This rule applies alike to pleading statutes or contracts.[25]

The relevance of the locus of the burden to this appeal is this. A complaint has been filed, proof of

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[20] *Bell* v. *Pennsylvania Railroad Co.*, C.A. Ill. 284 F. 2d 297 (1960); *New York, N.H. & H. Railroad Co.* v. *Seaboard Sales Corp.*, C.A. Mass. 258 F. 2d 376 (1958).

[21] *Stelling* v. *Richmond County*, 66 S.E. 2d 807.

[22] This is not to accept the "convenience and needs" test as a negative element of the statute, for since the entire enacting clause is framed in the negative ["The responsible agency shall not approve"] this creates a double negative or an affirmative posture for the convenience and needs factor. Recasting the entire clause in the affirmative; it would read, "The responsible agency shall approve any merger in which the convenience and needs of the community to be served clearly outweighs any substantially anticompetitive effects thereof."

[23] *Meeks* v. *Meeks*, 25 So. 668 (Ala. 1946); *Hyde* v. *Chappell*, 22 S.E. 2d 313 (Ga. 1942).

[24] Corpus Juris Secundum, Evidence § 105.

[25] *Protective Life Insurance Co.* v. *Swink*, 132 So. 728, 728 (Ala. 1931). See also cases cited in footnote 20 supra.

the material elements of which will not establish even a prima facie violation of any statute. It appears inescapable then that plaintiff's pleading is fatally defective.

The further proposition advanced on this point; that "convenience and needs" is a "justification or exemption under a special exception to the prohibitions of a statute generally" and therefore a matter of defense, simply ignores the origins and the purposes of BMA–66.

It must be apparent from the most cursory examination of 5(B) that "Convenience and needs" and "substantially anticompetitive effects" are coordinate factors whose juxtaposition evidenced a Congressional purpose of judicial balancing.[26] With this obvious interpretation the legislative history is, naturally, in accord.

In introducing the legislative question Representative Smith (Va.) said:

> It boils down largely to a question of the Department of Justice, under the act, being required to use these standards where the main consideration is the convenience and the necessity of the community. The only authority that would be left to fix standards by the Department of Justice would be the monopoly provision of the Sherman Antitrust Act.[27]

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[26] We note in passing, while rejecting the entire suggestion that "convenience and needs" is an exception to the general standards of BMA–66, that applicant's authority does not stand for the proposition that "convenience and needs"—if it were an exception—would be a matter of defense. *King & Howe* stands for the proposition that an exception in the enabling clause (as here) must be negatived by the pleader.

[27] Congressional Record, 2/8/66, p. 2332.

Representative Smith (Calif.)

> H.R. 12173 will:
>
> * * * Establish a standard [which will] add to the traditional standard of a lessening of competition [a] concept of convenience and needs of the community served.[28]

Representative Widnall (N.J.)

> H.R. 12173 states the conditions under which the banking agencies may approve a merger that is opposed by the Department of Justice. Furthermore the bill gives the courts clear guidelines for weighing banking factors against competitive factors.[29]

Representative Moorhead

> In H.R. 12173 we are merely saying that first the banking authorities, and then the Attorney General, and finally the courts may approve a bank merger "despite the foreseeable injury to competition" if "the merger would be consistent with the public interest" [quoting from *Seaboard Air Line R. Co. v. United States,* 34 L.W. 3181][30]

Representative Stanton

> it was the expressed purpose and intent of Congress when it passed the Bank Merger Act in 1960 to make certain that control of bank mergers should be in the hands of the appropriate banking supervisory agencies, and that while the competitive effects of a proposed merger should be considered, they were not to be given a predominant position.

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[28] *Id.*, p. 2333.
[29] *Id.*, p. 2335.
[30] *Id.*, p. 2341.

These standards were repudiated by the Supreme Court in the *Philadelphia National Bank* and the *Lexington Bank* cases in which the Court decided that the Justice Department had the final say in bank mergers. Contrary to the intent of Congress, the bank regulatory authorities were relegated on advising roles.

These provisions * * * reinstate a measure of antitrust consideration which was lacking in the Senate bill, and they provide a banking standard that may allow economic assistance to a community even though a merger tends to lessen competition in that community. It is this statutory balance that was intended in 1960 * * *.

The * * * bill * * * directs the courts to apply the banking standards as well as the competitive standards in any judicial proceeding attacking an approved merger transaction * * * it * * * gives these standards equal weight as between economic and competitive circumstances and it assures this equilibrium throughout the entire review procedure.[21]

Senator Proxmire

Subsection 5(b) was designed to change the law as it now stands, to allow the convenience and needs of the community to outweigh any anticompetitive effects that the merger might have.

Thus, it is a new standard. It is a clearly different standard that would apply in the case of banks.[22]

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[21] *Id.*, p. 2343.

[22] Congressional Record, 2/9/66, p. 2548.

APPELLANT'S RECITATION OF CONGRESSIONAL HISTORY

Appellant has cited the same authorities in the same way here as in its brief in *Crocker*. The court there, after an extensive recitation of the Congressional history of the Act, adverted to the citations of authority advanced by Counsel for the Department of Justice:

> Counsel has largely confined their quotations to those from Congressmen Weltner and Todd, who opposed the bill, and from Congressman Patman who bitterly fought the legislation and finally, through a face-saving compromise, introduced the bill, while stating that if he alone were writing the bill, he "would be against it as a matter of principle." (Cong. Rec. Feb. 8, 1966, p. 2357.) Counsel's choice of makers of remarks is not very persuasive.[33]

CONCLUSION

We think that—verbiage aside—this Court is being asked to turn back the clock and reinstate Clayton § 7 in banking. Here, Justice knows defendant's contentions and our findings on the question of convenience and needs.[34] It is not willing to accept the challenge of contesting them.

> To prove that the merger is not, in fact, necessary to achieve the benefits that are claimed for it also involves speculation and conjectures.[35]

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[33] Slip Opinion, p. 9.

[34] * * * defendants and the Comptroller urge very broad and general benefits to the community flowing from the creation of a larger bank with larger resources * * * (P. 15 Jurisdictional Statement)

[35] *Id.*

But the converse of this statement has equivalent probative merit. It was for this reason that the question was relegated to the administrative function. Appellant implies that the Courts cannot answer the question, yet insists that the regulatory agencies should not. We suggest that the position advocated by the appellant is hopelessly incongruent, and that, therefore, the judgment should be affirmed.

Respectfully submitted,

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